No. 7322.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Leo A. Madden, Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation,

Appellant,

vs.

Morris LaCofske,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

WARREN E. LIBBY,
Spring St. Arcade Bldg., 541 S. Spring, L. A.
Attorney for Appellee.

Parker, Stone & Baird Co., Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

No. 7322.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Leo A. Madden, Ancillary Receiver of Piggly Wiggly Yuma Company, a corporation,

Appellant,

vs.

Morris LaCofske,

Appellee.

APPELLEE'S PETITION FOR REHEARING.

To the Honorable United States Circuit Court of Appeals, for the Ninth Circuit:

Comes now the above named appellee, Morris LaCofske, and after decision adverse to him in the above entitled cause, petitions this Honorable Court for a rehearing herein, and for grounds therefor, assigns the following:

I.

That the court in its present opinion has not adhered to the true rule of law that a chancery receiver who adopts or affirms the lease of his insolvent is liable to the

lessor thereon for the entire term, and upon each and every covenant contained therein.

II.

That the court in its present opinion has not given any effect to the Receiver's act of adopting the lease and is not recognizing any distinction or difference in the liability of such a Receiver, (a) when he is first appointed and has qualified, (b) when he has taken possession of the leased property, and (c) when he has adopted and affirmed the lease of his insolvent.

III.

That the court in its present opinion, by the recognition of the precedents it cites therein, has acknowledged the correct rule (a) that the Receiver when he is first appointed is under no liability to the landlord, and (b) that when he has taken possession he is liable for the rental so long as he is in possession,—the same as any assignee who has not agreed to the lease,—but has incorrectly (c) held the Receiver who adopts the lease to the same liability as one who merely takes possession, whereas the Receiver who adopts should be and is held under the terms of the lease the same as an assignee who agrees to be bound by the lease, for otherwise great injustice is worked upon the lessor.

IV.

That the court has erred in its present decree that a Receiver who adopts and affirms the lease of his insolvent

is not liable to the lessor thereon for the entire term solely upon the authority of opinions and rulings announced in cases where there was no adoption or affirmation.

V.

That the court in its present decree has committed error in holding that such Receiver who adopts and affirms such a lease is not liable to the lessor thereon for the entire term, without assigning any precedent or authority therefor, or assigning any reason or equity as to why such rule should be applied.

VI.

That the court by its present decree in holding such Receiver not liable under the lease for the full term, after his adoption and affirmation thereof, has adopted and applied for the first time a rule which is unreasonable and inequitable and is a dangerous precedent.

VII.

That the court by its present decree has committed error in not assigning any reason why a Receiver who has adopted his insolvent's lease is not liable for the full term thereof for future guidance, because the instant case is the first time that an Appellate Court has been called upon to rule upon such Receiver's liability after adoption and affirmation of the lease.

VIII.

That the court has committed error in holding that such Receiver after such adoption and affirmation may escape

future liability under the lease by assigning it and delivering possession to the assignee; *i. e.,* this court of equity in its opinion has said that its Receiver may not directly escape future liability and evade the landlord's lien by abandoning the premises after he has adopted the lease, but may do so indirectly by assigning to a straw man, thereby enabling the straw man to do indirectly what it would not permit its Receiver to do directly. We do not believe the court intended this result.

IX.

That the court by its present decree has committed error in permitting the Receiver to escape such future liability, thereby working gross injustice upon the landlord in not only depriving him of his landlord's lien by permitting the Receiver's assignment to an irresponsible person without notice to the lessor, but also in failing to impress such landlord's lien upon the moneys paid to the Receiver for the assignment.

X.

That the court's present decree is inequitable in not giving the landlord judgment against the Receiver for the amount of rent due under the terms of the lease adopted and affirmed by the Receiver.

ARGUMENT.

The instant case so far as counsel for the Appellee have been able to discover is the first cause presented to an appellate tribunal involving directly the liability of a Receiver under his insolvent's lease after he has adopted and affirmed the lease. Under such circumstances, we feel that the court's conclusion should either be based upon good authority or be supported by reasoning derived from the application of purely equitable principles. We feel that the present decision is, so far as the opinion discloses, unsupported by either such authority or such reasoning.

The reasons and authorities for each and all of the foregoing grounds for their petition for rehearing are already set forth in appellee's briefs on file herein, excepting that most of the decisions cited in the opinion herein were not cited by either the appellant or appellee in either the briefs or arguments herein, and for that reason could not be analyzed or commented upon by appellee previous to this time. For that reason, in order to show that they are not authority for the liability of a Receiver after his adoption of his insolvent's lease, we now respectfully call the court's attention to each and all of the authorities cited in the opinion herein, as follows:

The first case relied upon and quoted from is *Farmers' Loan & Trust Co. v. Northern Pac. R. Co.,* 58 Fed. 257. The opinion in that case was rendered orally upon a petition of the lessor asking for a decree that the receiver be required to pay rental, as stipulated in the lease, for the leased lines during the time of their operation by the receiver, which petition was made after the court had entered its decree that the Receiver not adopt the lease

but surrender possession to the lessor. No ruling was called for, or made, concerning, nor could the language of the court's opinion apply to, the liability of a receiver after he had adopted the lease.

In the next case cited in the opinion herein of *Carswell v. Farmers' Loan & Trust Co.,* 74 Fed. 88, the opinion states, "it is clearly established that the receiver at no time had the slightest intention of adopting the lease", so that the issue could not possibly involve liability of a receiver after he had adopted the lease.

The third case cited in the opinion herein of *Mercantile Trust Co. v. Farmers' Loan & Trust Co.,* 81 Fed. 254, discloses that the opinion was rendered upon an appeal from an order denying the petition of the receivers for leave to renounce the lease in question, which order directed the receivers to pay the rent stipulated in the lease during the receivership from the income or proceeds of the property described in the lease. The Court of Appeals held this a proper ruling, *thereby constituting the opinion authority for appellee's contention herein,* rather than for the conclusion the court has reached therein.

In the next case cited in the opinion, that of *Dayton Hydraulic Co. v. Felsenthall,* 116 Fed. 961 (App. Br. p. 7), the lower court's ruling was based squarely upon the fact that the receiver had not adopted the lease and the Court of Appeals held that prior to such adoption the chancery receiver is not an assignee of the term of the lease. It is no authority for a holding that the receiver is not an assignee after his adoption of the lease.

In the case of *Pennsylvania Steel Co. v. New York City Ry. Co.,* 198 Fed. 721, the Court of Appeal's ruling was

that the receiver does not adopt the lease by operating the lines during the trial period. Therefore, the decision is not authority for the liability of the receiver after he has adopted the lease.

The case of *Westinghouse Electric & Mfg. Co. v. Brooklyn Rapid T. Co.,* 6 Fed. (2d) 547 (App. Br. p. 18), discloses affirmatively in the language quoted therefrom at page 5 of the opinion herein, where it says that the receiver "does not *by possession* become assignee of the term", that the court is considering only the liability of the receiver after he has taken possession of the leased property and before he has adopted or affirmed the lease. Consequently, the decision has nothing to say about the liability of the receiver, nor can it be taken as authority for such liability, after his adoption and affirmation of the lease.

The question of the authority of *Tiffany on Landlord and Tenant* has already been disposed of in appellee's brief, pages 13 to 16.

The entire misconception of the proper rule of law in this entire matter is traceable to the opinion in the case of *United States Trust Co. v. Wabash Railway,* 150 U. S. 287, containing the language quoted in the opinion herein at page 6. As already observed in appellee's brief herein (pages 7, 12, 13), three points must be noted concerning this decision:

1. The opinion was rendered upon a claim of the lessor for rent stipulated in the lease made after the time when the trial court had ordered the receiver not to affirm the lease and had directed him to surrender the leased property to the lessor when such possession was requested, conse-

quently, no decision as to the receiver's liability after adopting the lease could be involved or decided.

2. The decisions cited in that case by Honorable Justice Brown as his authority for his statement made as quoted in the opinion herein support only the first sentence of the quotation and are not any authority whatsoever for the last sentence which must be regarded purely as *dictum* as well as not supported by precedent as might be assumed from the context. This sentence used by Justice Brown without authority to support it, and made as a preliminary observation is the one relied upon for the court's conclusion herein. It is the only judicial expression we can find upon the subject, and because it was not supported by authority it should not be accepted without strong reasoning and equity being in its favor. We are unable to find either and the opinion herein has not helped us in that respect.

3. The conclusions of the court in the *Wabash* case were reached purely upon equitable considerations and not upon the rule of law quoted and relied upon by the opinion herein, and consequently, cannot be accepted as precedent for the conclusion here reached.

The case of *American Brake Shoe & Foundry Co. v. New York Rys. Co.,* 282 Fed. 523, presents an issue arising upon an application of the lessor for an order that the Receiver pay rent and taxes as stipulated in the lease during the period he was in possession, which application was made following an order of the lower court that the receiver not adopt the lease and after the leased property had been actually turned back to the lessor (see page 526). Furthermore, the expressions of *dictum* upon this

subject as set forth therein were also made on the sole authority and Justice Brown's above quoted language in the *Wabash* case.

In the second case of *Pennsylvania Steel Co. v. New York City Ry. Co.,* 219 Fed. 939, the issue arose on a claim made by the lessor for rents as stipulated in the lease for the period the receiver had operated the lines, which operation was "acquiesced in" by the lessor as a period of "experimental operation" and was a period during which "the receivers operated these lines for the benefit of the lessors", and which lines were turned back to the lessors at the end of that period. Consequently, no question of the liability of the receiver after his adoption of the leases could be involved.

The opinion in the case of *General Finance Corporation v. New York State Rys.,* 54 Fed. (2d) 1008, was written upon an appeal from an order of the lower court granting the receiver's petition "for an order disallowing and disaffirming" the lease, and consequently could not possibly involve the receiver's liability after an adoption had taken place.

The opinion herein relies upon the authority of *Lewis on The Law of Leases of Real Property,* pages 35, 493, 494, a check of which discloses that the text at those points is merely the verbatim quotation of the syllabi in the published volume reporting the case of *American Brake Shoe & Foundry Co. v. New York Rys. Co., supra.* Consequently, this text can be no greater authority than the *American Brake Shoe & Foundry Co.* case which has already been disposed of and which is cited as the authority for the text.

The last case relied upon by the opinion herein upon this branch of the law is that of *Northwestern Mut. Life Ins. Co. v. Security S. & T. Co.,* 261 Fed. 575. This case is not even a receivership case and, consequently, cannot involve the liability of a receiver after the time when he has adopted a lease.

In conclusion, we feel that the opinion herein has worked great injustice upon the landlord and has not done equity. We say this because the decree which would flow from this opinion as the decree of a court of equity will necessarily countenance the act of its receiver accomplishing an injustice indirectly by means of an assignment of the lease, which it would not allow the Receiver himself to do directly by his own act. There is no escape from the observation that the landlord is in a worse position by the adoption and assignment by the Receiver, for not only is the landlord deprived of all control over his property, including all opportunity to obtain a new tenant while the Receiver, or his assignee, holds the property and gives no definite time of termination, but also he is deprived of his lien, which deprivation a court of equity would not permit through its Receiver.

Wherefore, appellee respectfully submits that a rehearing should be granted herein upon the authority already cited in his briefs filed herein.

Respectfully submitted,

WARREN E. LIBBY,
Attorney for Appellee.

Certificate of Counsel.

I, Warren E. Libby, counsel for the appellee herein, hereby certify that in my judgment the foregoing petition for rehearing in the above entitled case is well founded and that it is not interposed for delay.

WARREN E. LIBBY,

Attorney for Appellee.